

Abbreviations

ABC FM	American Board of Commissioners for Foreign Missions
AH	State Archives of Hawai'i
BH	Board of Health, AH
BHL	Board of Health Letters, AH
BHM	Board of Health Minutes, AH
BPRM	Bernice Pauahi Bishop Museum
BPRO	British Public Record Office
CCM	Cabinet Council Minutes, AH
DB	<i>Daily Bulletin</i>
DPI	Department of Public Instruction, AH
EB	<i>Evening Bulletin</i>
F	<i>The Friend</i>
FO & Ex	Foreign Office and Executive File, AH
FOLB	Foreign Office Letter Book, AH
HA	<i>Honolulu Advertiser</i>
HAA	<i>Hawaiian Almanac and Annual</i> ; also called Thurum's Annual
HBC	Hawai'i State Bureau of Conveyances
HG	<i>Hawaiian Gazette</i>
HHS	Hawaiian Historical Society
HJH	<i>Hawaiian Journal of History</i>
HMGCS	Hawaiian Mission Children's Society
HSB	<i>Honolulu Star-Bulletin</i>
ID	Interior Department, AH
IDLB	Interior Department Letter Book, AH
IDLF	Interior Department Land File, AH
IDM	Interior Department Miscellaneous, AH
MH	<i>Missionary Herald</i>
P	<i>Polynesian</i>
PCA	<i>Pacific Commercial Advertiser</i>
PCR	Privy Council Records, AH
PP	<i>Paradise of the Pacific</i>
RHAS	Royal Hawaiian Agricultural Society
SG	<i>Sandwich Islands Gazette</i>
SIN	<i>Sandwich Islands News</i>
SSB & A	<i>Sunday Star-Bulletin and Advertiser</i>

PAUL F. NAHOA LUCAS

E Ola Mau Kākou I Ka 'Ōlelo Makua:
Hawaiian Language Policy and the Courts

THE ARRIVAL OF THE WRITTEN WORD AND THE PROSPECTS FOR
A BILINGUAL SOCIETY

Centuries before the first European discovery of Hawai'i by Captain James Cook in 1778, the chief medium of communication in Hawai'i was the *'ōlelo*, or spoken Hawaiian.¹ Hawaiian is a poetic, expressive language consisting of a vocabulary of some twenty-five thousand words.² Linguistically, Hawaiian belongs to the family of Austronesian (Malayo-Polynesian) languages and has a pleasing sound to the ear because it follows the pattern of phonotactics common in Polynesian languages, that is, every syllable ends with a vowel.³ In addition, Hawaiian has no consonant clusters and no sibilants. Samuel H. Elbert remarked that

Hawaiian has the simplest sound system of any Malayo-Polynesian language, and perhaps of any language in the world. . . . A famous linguist suggested that, because of its simple sound system, its simple grammar, its rich vocabulary, and its receptivity to incorporation of loan words, Hawaiian would be preferable to Esperanto or English as a world language.⁴

The rich and extensive Hawaiian vocabulary reflected the Hawaiians' symbiotic relationship with their environment. For example, there

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The Hawaiian Journal of History, vol. 34 (2000)

are more than 64 words for rain and 133 words for house.⁵ Hawaiians used figurative meaning, as one scholar remarked, "to an extent unknown in English."⁶ More importantly, the spoken word for Hawaiians embodied the *mama*, or life forces that carried significant physical and spiritual powers unknown in Western society. There is a well-known *'ālelo no 'ēau*, or Hawaiian proverb, that says "I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make" ("In language there is life and in language there is death").⁷ For Hawaiians, the spoken word had the power to predict the future, heal the sick, and cause illness, injury, and even death.⁸

After missionaries arrived in Hawai'i in 1820, they eventually sought to educate Hawaiians about Christianity in their native language, motivated primarily by the directives of their employer, the American Board of Commissioners for Foreign Missions (ABCFM),⁹ but also by, as one scholar says, "simple logistics," that is to say, native Hawaiians were many and the missionaries few.¹⁰ The missionaries' effort to reduce the oral Hawaiian language into writing was greatly assisted by previous missionary efforts to develop a written language for Tahitians. Two years after their arrival, the missionaries printed the first sixteen-page primer in Hawaiian, the *Pi-ā-pā*.¹¹ And Native Hawaiians quickly mastered the written medium in their native language. By 1853, nearly three-fourths of the Native Hawaiian population over the age of sixteen years were literate in their own language.¹² The short time span within which native Hawaiians achieved literacy is remarkable in light of the overall low literacy rates of the United States at that time.¹³ Given Hawaiians' rapid and successful transformation from an entirely oral culture to a literate culture, Hawai'i had the opportunity to become a bilingual nation comparable to some European countries. The push by Hawai'i's leaders to transform Hawai'i into a Western society, however, resulted in the suppression and near extinction of its indigenous language.

MUTUAL RESPECT AND BENIGN NEGLECT:

THE "ENGLISH-MAINLY" CAMPAIGN (1820-1895)

By 1850, Hawai'i had established a constitutional, monarchical form of government similar to those of European nations such as Great Britain. Although, as one writer commented, "[b]y 1850, English had become the language of business, diplomacy, and to a considerable

extent, of government itself,"¹⁴ the Hawaiian government's policy toward languages other than English was one of tolerance, a testament to the inclusive nature and spirit of the Hawaiian culture. Hawai'i had no "Hawaiian-only" laws, nor was English the sole medium of communication. In summarizing the state of affairs for this period, Chief Justice Albert F. Judd remarked in 1892:

We are aware that, though the Hawaiian language is the original language of this people and country, the English language is largely in use. Of necessity the English language must be largely employed to record transactions of the government in its various branches, because the very ideas and principles adopted by the government come from countries where the English language is in use. Not that it is exclusively employed, or that the use of the Hawaiian language in any instance would not be perfectly regular and legal. The records of our courts show pleadings of all kinds in the Hawaiian language received with as much approval as those in English. Which language would be used would depend upon the comparative familiarity of the writer with one or the other.¹⁵

Beginning in 1846, the Hawaiian legislature declared that all laws enacted were to be published in both Hawaiian and English.¹⁶ The use of both the Hawaiian and English versions of the kingdom's laws ultimately led to disputes over which version applied to the facts of a particular case. In early reported decisions, the Hawai'i Supreme Court reaffirmed the supremacy of Hawai'i's indigenous language as the governing law of the Islands. In *Melcalf v. Kahai* (1856), Associate Justice George Robertson, writing for the court, held that the Hawaiian version of a particular section in the kingdom's penal code, which provided that an owner of an animal who commits a trespass is liable for a fair and reasonable amount of the loss and damage sustained, prevailed over the English version, which provided for four times the amount of damage done or the value destroyed, because it had "been the practice of this court" and "we conform to it in this instance."¹⁷ Five months later, the Supreme Court was asked again in the case of *Hardy v. Ruggles* to decide whether the Hawaiian or English version of a particular statute controlled. The English version required that all documents filed with the Bureau of Conveyances were to be stamped prior to filing. The Hawaiian version, however, had no such requirement. Chief Justice William L. Lee, writing for the Supreme Court,

held that "where there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country. This doctrine was first laid down by the Superior Court in 1848, and has been steadily adhered to ever since." Chief Justice Lee further explained that "the English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight.[.]"¹⁸ The Supreme Court's legitimization of Hawaiian as the dominant language, however, was short-lived. Three years after *Hardy* was decided, "English-mainly" advocates lobbied the Hawaiian legislature to enact a new law in 1859 which reversed Lee's decision by providing that "[I]f at anytime a radical and irreconcilable difference shall be found to exist between the English and Hawaiian versions of any part of this Code, *the English version shall be held binding*" (emphasis added).¹⁹ In a later decision, Chief Justice Albert F. Judd, writing for the Supreme Court, attempted to reconcile any discrepancies in the translation and interpretation of the dual laws by holding that "the two versions constitute but one act. There is no dual legislation. As a rule, one version is the translation of the other. The effort is always made to have them exactly coincide, and the legal presumption is that they do."²⁰ Despite Judd's pronouncement, however, English remained the controlling law in Hawai'i. Nonetheless, Hawai'i continued to publish its laws in both Hawaiian and English²¹ until 1943, when the practice of publishing laws in Hawaiian was abolished by statute.²²

Missionaries such as William Richards and Dr. Gerrit P. Judd, who left missionary work to serve as official translator/interpreters for King Kamehameha III, became proficient in both Hawaiian and English and performed their government duties faithfully without ever publicly advocating the use of one language to the exclusion of the other.²³ However, not all missionaries who left mission work to work for the Hawaiian government endorsed tolerance and diversity. Richard Armstrong, a former missionary who served as the second minister of public instruction for the kingdom of Hawai'i from 1848 until his death in 1860, strongly supported the use of English in Hawai'i's school system. Armstrong's "English-mainly" attitude is reflected in his own writing:

Were the means at our command, it would be an unspeakable blessing to have every native child placed in a good English school, and kept

there until it had [acquired] a thorough knowledge of what is now, in fact, to a great extent, the business language of the Islands, and which would open its mind to new and exhaustless treasures of moral and intellectual wealth.²⁴

Armstrong further remarked, "[T]he language of a nation is part of its very being and never was and never will be changed except by a very gradual process."²⁵ Armstrong's philosophy was clearly contrary to that of his former employer, the ABCFM. In a letter to the Sandwich Island Mission, Rufus Anderson, corresponding secretary for the ABCFM in Boston, wrote on April 10, 1846:

I trust you will not fall in with the notion, which I am told is favored by some one at least in the government, of introducing the English language, to take the place of the Hawaiian. I cannot suppose there is a design to bring the Saxon race in to supplant the native, but nothing would be more sure to accomplish this result, and that speedily.²⁶

During Armstrong's administration, the first government-sponsored school in English was established in 1851, and by 1854, government-run English schools were effectively competing with the Hawaiian-medium schools.²⁷ Hawaiian-medium schools, which held the most promise for educating Hawaiians in their native language and developing them as competent bilingual speakers, suffered. Appropriations given English-medium schools as well as salaries paid to teachers were considerably higher.²⁸ Loss of pupils to English-speaking schools meant a loss of jobs for many Hawaiian teachers and increased job opportunities for the English-speaking community.

When immigrant plantation workers arrived in Hawai'i, the government chose to educate their children in English rather than in Hawaiian. In 1886, the minister of public instruction's report to the Hawaiian legislature noted that "In the future, therefore, if these heterogeneous elements are to be fused into one nationality in thought and action, it must be by means of the public free schools of the nation, the medium of instruction being the English language chiefly."²⁹ Indeed, many native Hawaiians as well as Asian immigrants chose to enroll in English- rather than Hawaiian-medium schools.

Early writers attempted to explain the decline in attendance at Hawaiian medium schools as

The desire of the Hawaiians to have their children taught the English language. Petition after petition is constantly being received by the Board [of Education] asking to have the Common schools [i.e., Hawaiian-medium schools] changed into English Schools. The result will be then in a very few years more the Common Schools will have ceased to exist.³⁰

To be sure, the number of written materials developed for Hawaiian-medium schools was limited when compared to the literature developed in English.³¹ As one scholar remarked, however:

Although this could be construed as a choice for Hawaiians, that is, of either going to the Hawaiian-language common schools or to the English-language select schools, in reality, the quality of education provided was not the same. Most of the teacher professional development was conducted only for English-speaking education, and many of the texts and materials brought from the United States were not translated for usage in the common schools. Because Hawaiians recognized the need to acquire this new knowledge in order to live in their changing islands, they naturally attempted to enter the select schools.³²

Successive administrations in the Department of Education continued to uphold Armstrong's "English-mainly" policies. As the president of the Board of Education remarked in his annual report to the legislature in 1884: "Why worry over the quality of teachers in Hawaiian? We shan't need them much longer, anyway."³³ Similarly, in 1890, the president of the Board of Education remarked that Hawaiian-language schools were "Useful in places where it is absolutely impossible to obtain teachers who know anything of the English language. . . . In such places funds at the disposal of the Board hardly warrant the expenditure of even twenty dollars a month upon a teacher."³⁴ English-only advocates later attempted to justify their fiscal neglect of Hawaiian-medium schools by reflecting on the inferior quality of those schools:

Very little had been attempted before 1870 toward curriculum reconstruction [in Hawaiian-medium schools]. Retarding influences lay in the use of the Hawaiian language with its lack of extensive literature, in the inadequate facilities for the training of teachers, and in the almost universal faith in the three R's.³⁵

Armstrong's philosophy extended to the private schools as well. For example, one writer noted that William B. Olson, the first headmaster of the all-Hawaiian Kamehameha Schools for Boys in 1887, ". . . being a strict disciplinarian, did not propose to leave to chance the *esprit de corps* he desired. . . . Strict rules were set to prevent the use of other than the accepted tongue [English] on the campus."³⁶

Not all missionaries, however, shared Armstrong's views. The Reverend Lorrin Andrews remarked in 1864 that

If English is taught to any advantage, many years must be spent,—much expense incurred,—qualified teachers must be employed,—the scholars must be kept learners, and there must be a watchful eye on the working of the whole system. . . . At all public institutions, English may be taught as a branch, and the expense may come out of the funds of that school; but for the Government to set up English schools, to the neglect of educating its own people in their own language, would, in my opinion, be a suicidal act.³⁷

Similarly, the Reverend Lorenzo Lyons, also known as Laiana, said:

I've studied Hawaiian for 46 years but am by no means perfect. . . . It is an interminable language. . . . it is one of the oldest living languages of the earth, as some conjecture, and may well be classed among the best. . . . the thought to displace it, or to doom it to oblivion by substituting the English language, ought not for a moment to be indulged. Long live the grand old, sonorous, poetical Hawaiian language.³⁸

Despite Andrews's and Lyons's protests to the contrary, the relentless push for the use of the English language throughout Hawai'i's society continued. The government's efforts to promote English while publicly scorning Hawaiian is evident in *The King v. Grievé*, a reported decision issued by the Hawai'i Supreme Court in 1883.³⁹ In *Grievé*, Robert Grievé, a non-Hawaiian who was the manager and part-owner of the Hawaiian Gazette Printing Office, was charged with the offense of common nuisance for printing a program written in Hawaiian of various hula to be performed at King Kalākaua's coronation festivities, which the government claimed was "obscene." Although the request to print such a program was made "by an officer of the Government," only Grievé, who could not speak or read Hawaiian, was

charged and convicted of the offense.⁴⁰ In its decision, the Supreme Court reversed the lower court's conviction, finding Griève "not guilty" because he did not understand Hawaiian and therefore did not have the intent to commit such a crime.⁴¹ Although the Supreme Court decided *Griève* on a narrow point of law, the government's criminal prosecution was a disturbing sign that the free and open exercise of Hawaiian was gradually eroding.

OUTRIGHT SUPPRESSION, PUNISHMENT, AND THE RAPID DEMISE OF THE HAWAIIAN LANGUAGE (1896-1987)

After the overthrow of the Hawaiian monarchy in 1893, the English-mainly campaign transformed into an English-only one, as advocates stepped up their efforts to accelerate the extermination of Hawaiian. Advocates targeted the field of education, where the next generation of native speakers would receive their instruction. In 1896, three years after the overthrow of the monarchy, the newly created Republic of Hawai'i enacted a law requiring that English be the medium of instruction in all public and private schools. That law provided:

The English language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the schools, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.⁴²

Six months before the 1896 law took effect, the Reverend McArthur revealed the motives underlying the enactment of that law:

The English language will be taught in all the public schools. For a time all former methods of mission work have been disarranged; but now there will be adjustments to new conditions. . . . The present generation will generally know English; the next generation will know little else. *Here is an element of vast power in many ways.* With this knowledge of English will go into the young American republican and Christian ideas; and as this knowledge goes in, *kahunanism, fetishism and heathenism generally will largely go out.* (Emphasis added)⁴³

As set forth in the language of the 1896 law, although schools had the option not to participate, nonparticipating schools would not continue to be recognized and thus would not receive government funding. As a direct result of the 1896 law, the number of Hawaiian-medium schools dropped drastically from a high of 150 in 1880 to zero in 1902. Conversely, the number of English-medium schools rose significantly from 60 in 1880 to 203 in 1902.⁴⁴ The government's 1896 report noted that "The gradual extinction of a Polynesian dialect may be regretted for sentimental reasons, but it is certainly for the interest of the Hawaiians themselves."⁴⁵ Based largely on the 1896 law and its accompanying government educational policies, the territorial period was marked by the open suppression of Hawaiian in the public schools. For instance, in 1897 the course of study for all public elementary schools began with a plan to "Teach children to express in English what they perceive and what they do in the schoolroom, on the playground, on the way to school, and at home."⁴⁶

Although complete statistics are not yet available, there are numerous accounts in the Hawaiian community of Hawaiian children being punished for speaking Hawaiian in school.⁴⁷ Hawaiian was strictly forbidden anywhere within schoolyards or buildings; physical punishment could be harsh. Teachers who were native speakers were threatened with dismissal for singing Hawaiian in school, and, at times, teachers were even sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.⁴⁸ In 1917, a writer to the newspaper *Ka Puuhonua o Na Hawaii* lamented that "[t]here is no child under 15 years of age who can converse correctly in the mother tongue of this land."⁴⁹ Because Hawaiian was no longer the medium of instruction in the schools, many children found fewer and fewer opportunities to use Hawaiian outside the home. Newspapers, which at the time were the primary medium for communication in Hawaiian, declined from a total of twelve (nine secular, three religious) in 1910 to one (religious) in 1948.⁵⁰ When radio and television replaced newspapers as the major media, they included no Hawaiian programs.

As a result of this oppressive campaign against the use of Hawaiian, as well as all languages other than English, the use of Hawaiian went "underground" and remained largely in use with families who continued to value the Hawaiian language, in churches, and Hawai-

ian societies. But even those places of refuge were not safe from harm. For example, church services conducted in Hawaiian were eventually replaced with English by the 1960s because most of the native-speaking ministers had died.⁵¹ Today, little remains of the Hawaiian-speaking community. The language has a single native-speaking community of some 150 individuals located on the island of Ni'ihau. In addition, there are fewer than two thousand native speakers, all above sixty years of age scattered throughout O'ahu, Molokai, Hawaii, Lanai, Maui, and Kauai, who must function within an English-speaking environment.⁵²

The territorial legislature made several attempts to reintroduce Hawaiian into the all-English curriculum, but such attempts were nothing more than window-dressing. For instance, in 1919, the legislature amended the successor to the 1896 law to state "... the Hawaiian language shall be taught in addition to the English in all normal and high schools of the Territory[.]"⁵³ In 1935, the statute was amended further to provide "... that daily instruction for at least ten minutes in conversation or, in the discretion of the department, in reading and writing, in the Hawaiian language shall be given in every public school conducted in any settlement of homesteaders under the Hawaiian homes commission[.]"⁵⁴ However, as set forth in the plain language of these amendments, Hawaiian was not a medium but rather a course of instruction. In an attempt to comply with the wishes of the legislature, the Board of Education published in 1930 one textbook titled *First Book In Hawaiian: A Text Book In The Hawaiian Language*, by Mary Atcherly, which has been heavily criticized as a vain attempt to reintroduce Hawaiian into the school curriculum. The 1919 and 1935 amendments were, as one scholar put it, "at best—far-cical, and—at worst—insulting to the language and culture"⁵⁵ and were eventually repealed by the state legislature in 1965.⁵⁶

EFFORTS TO REVITALIZE HAWAIIAN: HAWAIIAN IMMERSION AND WRITING CHECKS IN HAWAIIAN

Hawaiian was in danger of becoming a dead language like Latin until efforts in the 1970s and 1980s led to its rebirth. The initiative to establish Hawaiian-language schools began in the early 1980s with the creation of the Pūnana Leo preschools, administered by a private, non-profit organization called the 'Aha Pūnana Leo.⁵⁷ Modeled after the

well-established Maori-language preschools Te Kohango Reo in Aotearoa (New Zealand), the Pūnana Leo preschools have grown from two to more than ten schools statewide. In 1987, after repeated requests by parents and Hawaiian-language advocates, the Board of Education (BOE) approved the Hawaiian Language Immersion Project, a two-year pilot program for children who wished to continue their education in Hawaiian after graduating from Pūnana Leo.⁵⁸ The basis for creating the project was a 1986 amendment to section 298-2, the successor provision to the 1896 English-only law, to allow "special projects using the Hawaiian language as approved by the board of education."⁵⁹ In approving the project, the BOE cautioned that "it will be in concept only and that it will be contingent on the Department [of Education] being able to find the resources to implement the program." Specifically, the implementation of the project was "contingent on the availability of qualified personnel, parent/student interest, and sufficient curriculum materials."⁶⁰ Nonetheless, despite the BOE's reservations, the Hawaiian Immersion Program, now known as Pāpāhāna Kūla Kaiāpuni, has steadily grown since 1987. In 1988, the BOE voted to expand the program to the second grade, and a year later, to the sixth grade.⁶¹ In 1992, the BOE approved extending the program to grade twelve.⁶² In 1994, the BOE approved a long-range development plan for Pāpāhāna Kūla Kaiāpuni. The stated goals of the program are: to assist the Hawaiian-speaking families in the revitalization of the language and culture and maintain usage of the language, to assist those families who wish to integrate into the Hawaiian-speaking community by eventually replacing their home language with Hawaiian for future generations, and to assist those families who wish to use Hawaiian as a second or third language in interacting with the Hawaiian-speaking community.⁶³ In June of 1999, the first Kaiāpuni class graduated from high school.

Despite the significant advances by language-rights advocates to improve and strengthen Kūla Kaiāpuni, the BOE has remained unwilling to commit sufficient funds to develop curriculum materials and teacher training that will place Pāpāhāna Kūla Kaiāpuni on a level that equals or exceeds the instruction given in English in public schools. Funding for the sixteen Kaiāpuni school sites has remained constant since 1993 at \$3.1 million dollars, despite the addition of eight schools since 1994. Overall, spending per pupil decreased from \$1,845 in fiscal year 1991-1992 to \$849 per student in fiscal year

1997-1998.⁶⁴ Moreover, the BOE has refused to recognize that it has an affirmative duty to establish and adequately fund Hawaiian medium schools for children who desire to be educated in Hawaiian and not English. The BOE's official position is that Papahana Kula Kaiapuni is a program of choice and not of right in the public school system.⁶⁵ Thus, amenities normally afforded school programs conducted in English (e.g., bus transportation, curriculum materials, resource teachers, and the like) are provided to Kula Kaiapuni students only if funds are available.

In addition to the rise of Hawaiian immersion schools, Hawaiian language advocates have also sought to reestablish Hawaiian as a language of commerce, namely, by requesting that banks and other lending institutions accept drafts written in Hawaiian.⁶⁶ This phenomenon began in the late 1980s and has raised a stir in the banking community, which normally receives drafts in English. The response has been mixed, depending on the policies of the lending institution. Most institutions will accept drafts written in Hawaiian, provided that the customer has sufficient funds to cover the amount indicated on the draft.⁶⁷

EFFORTS TO STRENGTHEN THE LAW ON SPEAKING AND WRITING HAWAIIAN

Federal Law

It is well established that under the U.S. Constitution neither the federal nor state government can enact laws restricting the use of non-English languages.⁶⁸ It is also equally well established that the government does not have an affirmative duty under federal law to provide non-English speakers or speakers who have limited proficiency in English with programs or services in their own native language.⁶⁹ Efforts to establish and strengthen the use of Hawaiian, however, create a unique situation for language-rights advocates because most of the children enrolled in Hawaiian immersion use English as their first language and Hawaiian as their second language. The only federal law that attempts to address the concerns of Hawaiian language-rights advocates is the Native American Languages Act (NALA),⁷⁰ which, among other things, establishes a national policy on the use of indigenous languages by encouraging native American children to be edu-

cated in their own language. Since Congress passed NALA in 1990, however, federal courts have taken a restrictive view toward implementing the goals and policies underlying the statute.

There are only two reported cases that discuss the nature and extent of claims brought under NALA, and both were brought by native Hawaiians. In *Tagupa v. Odo* (1994), William Tagupa, an attorney of Hawaiian ancestry who is fluent in English, refused to give his deposition in English, arguing that Article XV, section 4, of the state constitution and NALA "prohibit federal courts from mandating that . . . [he] . . . give deposition testimony in English."⁷¹ In rejecting Tagupa's NALA claim, federal District Judge Alan C. Kay held that a review of the relevant provisions and legislative history of NALA showed that Congress did not intend to extend NALA "to judicial proceedings in federal courts. The Language Act [NALA] deals almost exclusively with increasing the use of Native languages in the education and instruction of Native Americans."⁷² Thus, the court found no connection between implicating NALA and allowing Tagupa to give his deposition in Hawaiian. Moreover, Judge Kay held that allowing Tagupa to give his deposition in Hawaiian would be contrary to NALA and the Federal Rules of Civil Procedure, which mandate the "just, speedy, and inexpensive determination of every action," because

[P]ermitt[ing] Mr. Tagupa to give his deposition in Hawaiian would only add needless delays and costs to this dispute since Hawaiian language testimony would require the parties to find (and pay) a qualified interpreter whose services were acceptable to both parties. In addition, a Hawaiian language deposition inevitably creates disputes over the 'correct' English translation of Mr. Tagupa's deposition answers.⁷³

In *Office of Hawaiian Affairs v. Department of Education* (1996), the Office of Hawaiian Affairs (OHA) filed suit against the Department of Education and various officials claiming that the department's failure to provide sufficient financial and technical support for the Hawaiian immersion program was a violation of state law and NALA. Specifically, OHA asked "the Court to require Defendants (1) to provide sufficient resources (teachers, classrooms, and learning materials) for Hawaiian immersion programs in public schools, (2) to devise a plan to expand Hawaiian language programs and make them accessible, and (3) to develop a pool of teachers for Hawaiian language immer-

sion education."⁷⁴ The state removed OHA's suit, which was initially filed in state court, to federal court, arguing that OHA's claim under NALDA should be dismissed because the statute creates no enforceable rights nor an implied private right of action. Put another way, NALDA does not impose an affirmative duty on the state to provide the items requested by OHA. In granting the state's request to dismiss OHA's lawsuit, Judge Alan C. Kay found that the only provision of NALDA that could conceivably create an enforceable right is section 2904, which provides that "The right of Native Americans to express themselves through the use of Native American languages *shall not be restricted* in any public proceeding, including publicly supported education programs" (emphasis added).⁷⁵ In rejecting OHA's claim that this provision creates an enforceable right, Judge Kay held that

It is unclear whether this provision extends to state public education, rather than federally funded education programs discussed in other portions of the Act. Yet even assuming that it does, this "shall not be restricted" language does not place an affirmative duty on states to promote Hawaiian language through immersion programs, as suggested by Plaintiffs. Rather, assuming this provision applies to states, at most it prevents the state from barring the use of Hawaiian languages in schools. In addition, as discussed, *supra*, despite Plaintiff's contentions to the contrary it does not appear that the State of Hawaii currently restricts the use of Hawaiian languages in schools. To the contrary, the State has created Hawaiian language immersion programs in which 923 students participate and which Congress commended as an exemplary model when it enacted NALDA.⁷⁶

In addition, Judge Kay further found that "all other portions of the Act [NALDA] do not create affirmative duties on the states but merely evince a federal policy to 'encourage' states to support Native American languages."⁷⁷ Judge Kay dismissed OHA's NALDA claim and remanded the state claims to state court for further disposition.

State Law

While eighteen states have adopted "official-English" laws,⁷⁸ Hawai'i is the only state in the union that has a language in addition to English as its official language: Hawaiian. Unlike the federal government,

Hawai'i has taken affirmative steps to specifically recognize and protect its indigenous language. Following the constitutional convention proceedings held in 1978, voters ratified various amendments to the state constitution, three of which pertain to Hawaiian.⁷⁹ The first amendment, Article XV, section 4, provides that "English and Hawaiian shall be the official languages of Hawai'i." Section 4 further provides that Hawaiian would not be required for "public acts and transactions" except "as provided by law."⁸⁰

According to the article's constitutional-convention history, the amendment was approved because "Your Committee decided . . . to give full recognition and honor to the rich cultural inheritance that Hawaiians have given to all ethnic groups of this State, by making Hawaiian an official language of the State."⁸¹ Specifically, the delegates to the convention "[w]anted to overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system, and of today where Hawaiian is listed as a foreign language in the language department at the University of Hawaii."⁸²

The amendment to declare Hawaiian an official language "simply recognized the cultural contribution of Hawaiians to ethnic diversity in Hawai'i, as well as restoring Hawaiian to an equal position alongside English, particularly at the University of Hawaii."⁸³ In defending the amendment, delegate Patricia P. Nozaki argued that "[i]t is the duty and responsibility of this state to preserve all aspects of Hawaiiana in education, for it is this State which is the home of the Hawaiian people. Where else are we going to perpetuate it?"⁸⁴

In *Taguipa v. Oda*, the federal court held that the language and subsequent case law interpreting Article XV, section 4, "provides little guidance" in this area and that "a definitive judicial determination of this issue is better left to the Hawaii state courts."⁸⁵ Contrary to the language in *Taguipa*, however, no state courts have yet interpreted the legal effect of Hawai'i's "official language" constitutional provision.

The second amendment, Article X, section 4, mandates that "[t]he State shall promote the study of Hawaiian culture, history and language." Section 4 further provides that "[t]he State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools."⁸⁶ As set forth in the convention's proceedings, the rationale for adding this section was that:

This section is intended to thereby insure the general diffusion of Hawaiian history on a wider basis, to recognize and preserve the Hawaiian culture which has contributed to, and in many ways forms the basis and foundation of, modern Hawaii, and to revise the Hawaiian language, which is essential to the preservation and perpetuation of Hawaiian culture. (Emphasis added).⁸⁷

In reporting the amendment out of committee, the Hawaiian Affairs Committee focused on the need to preserve and perpetuate the Hawaiian language against the melting-pot model of assimilation, as well as the fact that Hawai'i is the "home country" and only place to study Hawaiian.⁸⁸ After the amendment was reviewed by the Committee of the Whole, the committee issued its report, essentially repeating the logic of the Hawaiian Affairs Committee, and strongly noted the need to strengthen diversity.⁸⁹ The Education Committee added that the proposed constitutional amendment "is indicative of your committee's belief that the study of Hawaiian culture, history and language should be vigorously promoted and encouraged."⁹⁰

In the convention debates, individual delegates also emphasized the importance of preserving and perpetuating Hawaiian. For example, delegate Alice Takehara paraphrased Larry Kauano Kimura in stating that Hawaiian culture, history, and language "were like 'fragile native plants struggling in the shadow of overbearing introduced trees' . . . [and] if inroads were to be made in this resurgence, they must encompass 200 years of deliberate and inadvertent obliteration of the soul and values of a nation." Delegate Frank de Costa added, "I want my kids to grow up and be able to speak Hawaiian, and not the *pīlan* words that I know." Delegate Kekoa D. Ka'apu spoke on the importance of the Hawaiian language:

To come to know a culture is to come to appreciate it, and to appreciate a culture is to respect it. . . . And to come to know this land and the traditions associated with the land in the early ages and in the schools, in a curriculum and in a course that is given the dignity of being regarded as one of the most important by its recognition within the Constitution, I think will convey to our young people the kind of appreciation and respect—not only for the land but for the culture derived from that land, and for the people, and for the language and customs that they developed.⁹¹

Finally, Delegate John D. Waihe'e "explained that the State was now mandated, in addition to providing for a Hawaiian education program in the public schools and utilizing community resources for it, to promote the study of the Hawaiian language, history and culture in all phases of state activities."⁹²

Despite the foregoing language in the legislative history, however, as with Article XV, section 4, no court has interpreted the nature and scope of Article X, section 4.

In addition to Articles XV and X, voters approved a third amendment, Article XII, section 7, which expressly provides that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes" by *ahu-pua'a* tenants of Hawaiian ancestry, "subject to regulation by the State."⁹³ As set forth in the convention proceedings, the Committee on Hawaiian Affairs

. . . decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. *Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.* (Emphasis added)⁹⁴

The Hawai'i Supreme Court has had the opportunity to interpret the nature and scope of this constitutional provision, unlike the two previous amendments. Since 1978, the Hawai'i Supreme Court has held that Article XII, section 7, imposes an affirmative duty on the judiciary⁹⁵ as well as the executive branch of government, that is, administrative agencies,⁹⁶ to protect and perpetuate traditional and customary practices. In 1995, the Supreme Court issued its landmark decision in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, commonly referred to as the PASH case, which held that the language of Article XII, section 7, creates an enforceable right in

ahupua'a tenants who choose to practice their traditions and customs under state law. The court was careful to point out that the amendment did not create a separate and independent enforceable right but merely reaffirmed all traditional and customary rights existing under state law. The court in PASH provided some "specific, although not necessarily exhaustive guidelines" in interpreting the nature and extent of the rights exercised under Article XII, section 7.⁹⁷ The Supreme Court held that in order to establish rights under Article XII, section 7, a practitioner must show that the right which is sought to be exercised is "reasonable," "traditional," and existed prior to November 25, 1892. Once a custom or practice is established, the burden shifts to the party opposing the practice or custom to show that actual harm would result by the imposition of the practice or custom. In balancing such competing interests, the state must "to the extent feasible" protect the legitimate exercise of those rights. And while state officials may have the authority to regulate the exercise of such rights, the court held that they do not have the "unfettered discretion to regulate the rights of *ahupua'a* tenants out of existence."⁹⁸ Although the court's interpretation of Article XII, section 7, in PASH was decided in the context of an access and gathering-rights case, the standard should be applied equally to other traditional and customary practices sought to be exercised by persons of Hawaiian ancestry, such as speaking Hawaiian, because the plain wording of Article XII, section 7, applies to the protection of "all rights."

Protection of Hawaiian under State Law

With the increased interest in speaking Hawaiian, Hawaiian-language advocates have sought to create or expand existing services for persons who choose to use Hawaiian. Nonetheless, the issue that remains unresolved is to what extent the 1978 constitutional amendments can be used as a tool to increase benefits for Hawaiian speakers. While advocates maintain that the language contained in Articles XV and X create enforceable rights in Hawaiian speakers, the Hawai'i Supreme Court, as a general rule, has been reluctant to find an enforceable right in the absence of express language to the contrary. The court has been guided by past decisions, which have held that words contained in the constitution are to be used in their natural sense and will

not be liberally interpreted unless it clearly appears from the context of the provision.⁹⁹ Since nothing in the amendments or the corresponding convention proceedings expressly allows Hawaiian speakers a right of action under Article XV or X, it is more likely that a court would find the language of these amendments similar to the language contained in MALA, that is, precatory rather than mandatory. With regard to Article XII, however, Hawaiian speakers would have a cause of action, as set forth in the PASH ruling, because speaking Hawaiian is a well-documented traditional and customary practice that has been exercised by Native Hawaiians for centuries, having remained in use throughout the nineteenth and twentieth centuries despite attempts by English-only advocates to suppress its use. Although Hawaiian speakers would enjoy a right of action, it is doubtful whether PASH would apply as an enforcement tool in the case for increased funding of Hawaiian immersion schools since advocates are seeking to compel state officials to increase funding for a state-created program rather than seeking to prevent a state official from interfering with their right to speak and write Hawaiian.¹⁰⁰

In the case of writing checks in Hawaiian, Hawaiian advocates may have a claim under the PASH ruling if the lending institution actually refuses to accept Hawaiian bank drafts. Using the elements of proof as set forth in PASH, once it is proved that a particular custom such as speaking Hawaiian has been in practice, the burden of proof shifts to the lending institution to show that accepting drafts in Hawaiian would result in "actual harm." It is difficult to conceive of the actual harm caused by accepting a check in Hawaiian, since it is not a violation of state law to write a bank draft in a language other than English.¹⁰¹ A possible example of actual harm could be increased cost due to the hiring of bilingual staff to process drafts in Hawaiian. Assuming that the lending institution could not meet its burden of proof, Hawaiian advocates would prevail.

CONCLUSION

Beginning with the Hawaiian monarchy, a steady and concerted effort was made by pro-English advocates to firmly establish English as the dominant language of the Hawaiian Islands without regard to Hawaiian. After the overthrow of the monarchy in 1893, this effort accel-

erated at an unrelenting pace, resulting in the virtual elimination of Hawaiian as a spoken language in everyday life. Efforts by Hawaiian-language advocates in the 1970s and 1980s brought a halt to the destruction of Hawaiian as a spoken language; the growth of Hawaiian-language immersion schools such as Papahana Kula Kaiapuni offer the best hope for the revitalization of Hawai'i's indigenous language in the twenty-first century. In addition, recent efforts by advocates to write checks in Hawaiian is a small but significant step in reestablishing Hawaiian as a language of commerce in their native homeland.

In the case of Papahana Kula Kaiapuni, the 1978 state constitutional amendments, which have been largely untested, may give language advocates the tools to compel state officials to bring Papahana Kula Kaiapuni in parity with other DOE programs operated in English. If immersion schools are ever to make a truly significant impact in Hawai'i, however, more government and private support need to be applied toward implementing the underlying goals and objectives set forth in the DOE's plan for Papahana Kula Kaiapuni. In any event, without institutional and financial support, Papahana Kula Kaiapuni is doomed to repeat the same fate that overcame the Hawaiian-medium schools at the turn of the twentieth century.

NOTES

¹ Other means of communication in early Hawai'i were nonverbal and included the use of *hū*, or conch shells, to announce the arrival of chiefs or to gather people for important events; sending messages using rhythms pounded by kapa-beaters on specially prepared kapa-making logs; and drawing *ki'i pohaku*, or petroglyphs, in rocks to record specific events. Julie S. Williams, *From the Mountains To the Sea: Early Hawaiian Life* (Honolulu: Kamehameha Schools P, 1997), 140-41.

² See Mary K. Pukui and Samuel H. Elbert, *Hawaiian Dictionary* (Honolulu: U of Hawai'i P, 1986).

³ Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* (Honolulu: U of Hawai'i P, 1994), 15.

⁴ Samuel H. Elbert, "Hawaiian and its Many Kin," unpublished manuscript on file in the Hawaiian Studies Institute, Kamehameha Schools (quoted in Donald K. Mitchell, *Resource Units in Hawaiian Culture* (Honolulu: Kamehameha Schools P, 1982), 30.

⁵ Schütz, *Voices of Eden* 206-7.

⁶ Schütz, *Voices of Eden* 209-10.

⁷ Mary K. Pukui, *Olelo No'ou: Hawaiian Proverbs and Poetical Sayings* (Honolulu: Bishop Museum P, 1983), 129 (No. 1191).

⁸ See, e.g., Mary K. Pukui, E. W. Haertig, and Catherine A. Lee, *Nana I Ke Kumu*, vol. I (Honolulu: Queen Lili'uokalani Children's Center, 1979) 85-88, 151.

⁹ The ABCFM strongly encouraged missionaries to teach and educate Hawaiians "in the native tongue." Larry K. Kimura and William Wilson, *Native Hawaiian Study Commission Minority Report*, vol. I (Washington: U.S. Department of the Interior, 1983) 173-203, 187. See also, Ralph S. Kuykendall, *The Hawaiian Kingdom*, vol. I, 1778-1854 (Honolulu: U of Hawai'i P, 1967) 360-67.

¹⁰ Maenette K. P. Benham and Ronald H. Heck, *Culture and Educational Policy in Hawai'i: The Silencing of Native Voices* (Mahwah, N.J.: Lawrence Erlbaum Assoc., 1998) 55. To be sure, the missionaries' initial efforts to educate Hawaiians were in the English language. However, these plans were slow and eventually gave way to a systematic approach of educating all Hawaiians about the teachings of Christianity in their native tongue. See Schütz, *Voices of Eden* 291-97.

¹¹ Benham and Heck, *Culture and Educational Policy* 55.

¹² Benham and Heck, *Culture and Educational Policy* 70; citing Robert C. Schmitt, *Historical Statistics of Hawai'i* (Honolulu: U of Hawai'i P, 1977).

¹³ Benham and Heck, *Culture and Educational Policy* 70. As used in this context, the term "literate" essentially means that native Hawaiians could read, write, and count in their native language.

¹⁴ Benjamin O. Wist, *A Century of Public Education in Hawai'i* (Honolulu, 1940) 70.

¹⁵ *In re Ross*, 8 Haw. 478 (1892) at 480.

¹⁶ As originally enacted, the 1846 law required that all laws be published in Hawaiian and English in the official government newspaper, *The Polynesian*. Act of Apr. 27, 1846, ch. 1, art. 1, sec. 5.

¹⁷ *Melcalj v. Kahai*, 1 Haw. 402 (1856) at 404.

¹⁸ *Hardy v. Ruggles*, 1 Haw. 457 (1856) at 463. Cf. *Haahala v. Montgomery*, 2 Haw. 62, 69 (1858) (where the English version of a deed is the original, and the Hawaiian version is "merely a translation," the English version will govern).

¹⁹ Civil Code of 1859, sec. 1493. In 1865, sec. 1493 was reenacted as a new law because the old law applied only to the "Civil Code of 1859." In its reenactment, the language of sec. 1493 was clarified to read that "[w]henver there exists a radical and irreconcilable difference between the English and Hawaiian versions of the laws of the Kingdom, the English version shall be held binding" (emphasis added). Act of Jan. 10, 1865, sec. 1. The change in the law may have come about because "while the legislature consisted of both Native Hawaiian and White representatives, the majority of Hawaiians were educated by the missionary, thereby swaying government decisions toward dominant colonial activity." Benham and Heck, *Culture and Educational Policy* 50.

²⁰ *In re Ross*, 8 Haw. at 480. See also, *Territory v. Bishop Trust Co., Ltd.*, 41 Haw. 367 (1956) (reenactment of a law originally passed during the monarchy and interpreted by the court at that time implicitly reincorporates the judicial interpretation) and *McBryde Sugar Co. v. Robinson*, [McBryde II] 55 Haw. 260, 289, n.

29, 517 P.2d 26, 42 n. 29 cited, 417 U.S. 976, 94 S.Ct. 3185, 41 L.Ed.2d 1146 (1974) (citing) (suggesting the need for comparative analysis between and English versions and that English prevails only whereal and irreconcilable difference" between the two versions)

21 See Revised Laws of Hawaii 1925, ch. 2, sec. 2, and Revised Laws of Hawaii of 1935, c1

22 1943 Haw. Sess. Laws, reported judicial decisions of the Supreme Court were pub 847 and 1881 in Hawaiian in two bound volumes, Volume I translated by William P. Ragsdale, and Volume II (1857-1881), by L. Sheldon, and were discontinued after 1881.

23 The Reverend William R347) resigned from the mission in 1838 to serve as "recorde" for Kamehameha III and was primarily responsible for tr civil and criminal laws into Hawaiian. In 1846, Richards w2amehameha as the first minister of public instruction for thred in that capacity until his death in 1847. Dr. Gerrit P. Judas appointed in 1842 to serve as the official recorder and in Richards resigned his position to travel with Thomas H2alilio to obtain British and American recognition for the Hawaiian

24 *Report of the President of tion to the Hawaiian Legislature* (1858) 11-12 (quoted in Schütz).

25 *Report of the President of ation* (1858) 12, quoted in Schütz, *Voices of Eden* 346. For at against the education of Hawaiian children in the English rano Kekuanao's speech in *Report of the President of the Board Hawaiian Legislature* (1864) 6-12. Kekuanao's argumentle effect on changing the Hawaiian government's policy to medium schools.

26 See note 44 in John E. Ige and *Dialect in Hawaii: A Sociolinguistic History to 1935* (U o) 43-51. This letter is also quoted in Kaykendall, *The Hawai'o-67* and in Schütz, *Voices of Eden* 344-45).

27 The name of the schoolu Free School. Kimura and Wilson, *Minority Report* 193. In nd Artemas Bishop, acting under contract with the Hawaiia, published two versions of an English-Hawaiian phrase book following preface: "The primary object of this MANUAL is to reverse in English. It is designed to help carry out the plan of to extend English schools among the indigenous race of thhasis added). Artemas Bishop, *English and Hawaiian Words arise of Learners in Both Languages* (Honolulu: H. M. Whitney, 1

28 Kimura and Wilson, A. See also Reinecke, *Language and Dialect in Hawaii* 47-48. 1 report of 1886 attempted to justify the

loss of qualified Hawaiian teachers: "The teaching in these schools, so far as may be judged from an examination of some of them, is very poor. This result may be attributed to several causes. In the first place, Hawaiians who have any ability and aptitude for teaching generally drift into other more lucrative [sic] occupations; and secondly, those who do teach prefer to teach in English, thus leaving the more incompetent for the Board of Education to select from." *Report of the President of the Board of Education to the Hawaiian Legislature* (1886) 12.

29 *Report of the President of the Board of Education to the Hawaiian Legislature* (1886) 6.

30 William De Witt Alexander and Alatau T. Atkinson, *An Historical Sketch of Education in the Hawaiian Islands* (Honolulu: Board of Missions, 1888).

31 The Reverend Lorrin Andrews lamented in 1834 that "probably one half of all the schools on the islands have at this day nothing to read but the pi-pa-pa." Lorrin A. Andrews, "Essay on the Best Practicable Method of Conducting Native Schools at the Sandwich Islands," read at the general meeting of the High School at Lahaina, App. 3 of the *Annual Report of the ABCFM*, read at the 25th Annual Meeting (1834) 156. Indeed, most of the printed materials developed for use in Hawaiian-medium schools between 1822 and the 1840s involved the teachings of Christianity. As the Reverend Sheldon Dibble remarked, "everything connected with instruction was inseparably connected in the minds of the people with Christianity." Quoted in William D. Westervel, "The First Twenty Years of Education in the Hawaiian Islands," *Nineteenth Annual Report (Twentieth Year) of the Hawaiian Historical Society For the Year 1911* (1912) 20. Between 1838 and 1886, a period of forty-eight years, only three books on Hawaiian history and culture by native writers appeared: *Ka Mooolo Hawaii* (1838); *Ka Kaao o Laikawai: Ka Huihaina o Pahiuli* (1863); and *Na Mele Aimoku, na Mele Kupuna, a me na Mele Pono i ka Moi Kalakaua I* (1886). To make up for the lack of literature, the majority of printed works appeared in the Hawaiian newspapers. Schütz, *Voices of Eden* 166, 171-73.

32 Benham and Heck, *Culture and Educational Policy* 93.

33 *Report of the President of the Board of Education to the Hawaiian Legislature* (1884) 11.

34 *The Biennial Report of the President of the Board of Education* (1890) 22-23.

35 Wist, *A Century of Public Education* 135. See also Alexander and Atkinson, *An Historical Sketch of Education* 4, who remarked that "the methods of teachers [at Hawaiian-medium schools] were of the rudest kind, and little was taught beyond reading, writing, elementary arithmetic, and geography."

36 Wist, *A Century of Public Education* 112.

37 Lorrin A. Andrews, *Value of the Hawaiian and English Languages in the Instruction of Hawaiians*, in *Hawaiian Evangelical Association's Proceedings*, 3 June to 1 July 1863 (Boston: Marvin, 1864) 107.

38 F. Sept. 2, 1878, 73.

39 *The King v. Grieve*, 6 Haw. 740 (1883).

- 40 *The King v. Grievé*, 6 Haw. 740 (1883) at 744.
- 41 *The King v. Grievé*, 6 Haw. 740 (1883) at 746.
- 42 Act of June 8, 1896, ch. 57, sec. 30 (codified in 1897 Haw. Comp. Laws at sec. 123). As Wist noted: "Perhaps the most interesting development in Hawaiian educational history was the change from the Hawaiian to the English language. Its use became almost universal before the end of [the] monarchy. By legal enactment the English language was made the sole medium of instruction in the public schools during the period of the Republic." Wist, *A Century of Public Education* 219-20.
- 43 *F. Dec.* 1895, 96.
- 44 Schütz, *Voices of Eden* 352.
- 45 *The Biennial Report of the President of the Board of Education* (1896) 6-7.
- 46 Quoted in Schütz, *Voices of Eden* 355.
- 47 For example, in *Ka Lei Momi o 'Ewa* (Honolulu: Ahahui Olelo Hawai'i, 1979) 19, noted Hawaiian scholar Sarah K. Nakoa recounts that as a young girl she was "slapped on the cheek [in school] for not recognizing her English name [Sarah Lum Chee]."
- 48 Kimura and Wilson, *Minority Report* 196.
- 49 *Ka Puuhonua O Na Hawaii* Jan. 26, 1917.
- 50 Schütz, *Voices of Eden* 362-63. The last Hawaiian-language newspaper, *Ka Hoku o Hawaii*, ran from 1906 to 1948. See Esther T. Mo'okini, *The Hawaiian Newspapers* (Honolulu: U of Hawaii P, 1974).
- 51 Kimura and Wilson, *Minority Report* 196.
- 52 Kimura and Wilson, *Minority Report* 191.
- 53 1919 Haw. Sess. Laws ch. 191, sec. 1.
- 54 1935 Haw. Sess. Laws ch. 21 (A-22), sec. 1.
- 55 Schütz, *Voices of Eden* 359, 309-10.
- 56 1965 Haw. Sess. Laws ch. 175, sec. 28.
- 57 The 'Aha Punana Leo is a grant recipient of the Native Hawaiian Education Act, Pub. L. No. 89-10, Title IX, sec. 7901 through 7912 (1994) (codified at 20 U.S.C. sec. 7901 et seq.) which provides, among other things, that Congress shall provide federal funds "to Native Hawaiian educational organizations or educational entities with experience in developing or operating Native Hawaiian programs or programs of instruction conducted in the Native Hawaiian languages[.]" 20 U.S.C. sec. 7905(a) (1994). A "Native Hawaiian language" is defined in the Act as "the single Native American language indigenous to the original inhabitants to the State of Hawaii." 20 U.S.C. sec. 7912(4) (1994).
- 58 Minutes of the Board of Education dated July 23, 1987, 9-10.
- 59 Haw. Rev. Stat. sec. 298-2(b) (1993). The purpose of the 1986 amendment was to educate students whose primary language was Hawaiian, not English. As set forth in the Senate report, the Committee on Education found "that the [present English-only] law is detrimental to communities, such as Ni'ihau, where Hawaiian, not English is the primary language used. This bill would enable the Department of Education to develop and implement special projects using the Hawaiian language when appropriate to meet the unique needs of affected students." Stand. Comm. Rep. No. 271, 1986 Senate Journal at 886-887. The House report echoed the language of the Senate report, adding "[t]his bill recognizes what already occurs daily in Ni'ihau school, where much of the communication takes place in the Hawaiian language. It would also make it possible to use currently developed materials, utilizing both English and Hawaiian languages, to maximize instruction and learning." Stand. Comm. Rep. No. 846, 1986 House Journal at 1415. The House report further reported that "[t]estimony was presented to Your Committee expressing a concern that the language of the bill was too broad. It was assured by the Department of Education that the intent of this bill is understood and, if a problem occurs, the language could be amended in the future" (emphasis added).
- 60 See Minutes of the Board of Education dated July 23, 1987, 9-10.
- 61 Minutes of the Board of Education dated Sept. 15, 1988, and June 15, 1989.
- 62 Minutes of the Board of Education dated Feb. 6, 1992. In September of 1992, the board voted to extend the one hour of instruction in English beginning in grade five to grades six through twelve. Minutes of the Board of Education dated Sept. 6, 1992.
- 63 Office of Instructional Services, State of Hawaii, Department of Education, *Long Range Plan for the Hawaiian Language Immersion Program Pōpōhāna Kula Kaiāpuni* (May 1994) 1-2.
- 64 Office of Instructional Services, State of Hawaii, Department of Education, *Operational and Financial Plan for the Hawaiian Language Immersion Program* (Jan 1998). In fact, only \$1.1 million is specifically allocated in the DOE budget for teacher position counts and the development of curriculum materials. The remaining \$2 million is derived from the DOE's general budget for teacher positions.
- 65 See, e.g., Testimony of Herman M. Aizawa, superintendent, Department of Education, before the House Committee on Hawaiian Affairs on H.B. No. 844, Jan. 30, 1997 ("The Board of Education at present considers the Hawaiian Language Immersion Program to be a program of choice").
- 66 Greg Barrett, "Fight for Hawaiian Checks pays off; some banks, merchants finally are beginning to accept them," *HA Dec.* 24, 1995: A-1; editorial, "Using Hawaiian: it's part of our culture," *HA Dec.* 26, 1995: A-6.
- 67 According to one recent article, all lending institutions, including credit unions, are accepting checks written in Hawaiian. See Will Hoover, "Hawaiian goes high finance," *HA Dec.* 2, 1999: D-1, D-10.
- 68 See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Farrington v. Tokushige*, 273 U.S. 284 (1927). In other settings, however, reasonable restrictions may be placed on the use of non-English languages. For instance, under Title VII, the federal antidiscrimination statute in governing employment, employers may restrict the use of English in the workplace as long as the policy does not have a discriminatory impact on its employees. See *Garcia v. Spain Steak Co.*,

- 998 F.2d 1480, 1487 (9th Cir. 1993) ("Title VII . . . does not protect the ability of workers to express their cultural heritage at the workplace").
- Sec. e.g. *Guadalupe Organization, Inc. v. Temple Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (no right to bilingual and bicultural education); *Sobernal-Peretz v. Heckler*, 717 F.2d 96 (2d Cir. 1983) (no right to social security notices and services in Spanish); *Carrona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (no right to unemployment notices in Spanish); *Frontiera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (no right to civil service exam in Spanish).
- ⁰ Native American Languages Act, Pub. L. No. 101-477, 101st Cong., 2nd Sess., 104 Stat. 1153, reprinted in 1990 U.S.C.C.A.N. 1153-1156 (codified at 25 U.S.C. sec. 2902 et seq.).
- ¹ *Tagufo v. Odo*, 843 F.Supp. 630, 631 (D. Haw. 1994).
- ² *Tagufo v. Odo*, 843 F.Supp. 630, 631 (D. Haw. 1994) at 632.
- ³ *Tagufo v. Odo*, 843 F.Supp. 630, 631 (D. Haw. 1994) at 632.
- ⁴ *Office of Hawaiian Affairs v. Department of Education*, 951 Supp. 1484 (D. Haw. 1996) at 1499.
- ⁵ 25 U.S.C. sec. 2904 (1995).
- ⁶ 25 U.S.C. sec. 2904 (1995) at 1495. Further, Kay quoted from President Bush's remarks when Bush signed NALIA into law, stating that he "construe[s] [NALIA] as a statement of general policy and do[es] not understand it to confer a private right of action on any individual or group." Presidential Statement on signing Pub. L. No. 101-477 into law (Oct. 30, 1990), reprinted in 1990 U.S.C.C.A.N. 1849-1.
- ⁷ 25 U.S.C. sec. 2904 (1995) at 1495.
- ⁷⁸ Alabama, Ala. Const. Amend. 509; Arkansas, Ark. Code Ann. sec. 1-4-117; California, Cal. Const. Art. III sec. 6; Colorado, Colo. Const. Art. II sec. 304; Florida, Fla. Const. Art. I sec. 9; Georgia, Ga.L. 1986, p. 529; Hawaii, art. XV, sec. 4; Illinois, Ill. Code 5 sec. 460/20; Indiana, Ind. Code Ann. sec. 1-2-10-1; Kentucky, Ky. Rev. Stat. Ann. sec. 2.013; Mississippi, Miss. Code Ann. sec. 3-3-31; Nebraska, Neb. Const. Art. 1 sec. 27, North Carolina, N.C. Gen. Stat. sec. 145-12; North Dakota N.D. Cent. Code sec. 54-02-13; South Carolina, S.C. Code Ann. sec. 1-1-696; Tennessee, Tenn. Code Ann. sec. 4-1-404; and Virginia, Va. Code Ann. sec. 22.1-212.1. Recently, Arizona's official English law, Ariz. Const. Art. XXVIII, was held by the Arizona Supreme Court to be overly broad and thus unconstitutional. See *Ruiz v. Hall*, 191 Ariz. 441, 957 P.2d 984 (1998), cert. denied, 119 S. Ct. 850 (1999).
- ⁷⁹ In addition to the constitutional amendments discussed, the state legislature enacted and then Gov. John D. Waihe'e signed into law in 1992 Act 169, which provides that: "Macrons and glottal stops may be used in the spelling of words or terms in the Hawaiian language in documents prepared by or for state or county agencies or officials. Any rule, order, policy, or other act, official or otherwise, that prohibits or discourages the use of these symbols shall be void." 1992 Haw. Sess. Laws, ch. 169, sec. 2 (codified at Haw. Rev. Stat. sec. 1-13-5 (1993)).
- ⁸⁰ Haw. Const., art. XV, sec. 4. The exemption for public documents and proceedings was because it would be "too expensive and impractical to require both languages" in the legislative and judicial branches. Hawaiian Affairs Committee, Stand. Comm. Rep. No. 57, reprinted in *I Proceedings of the Constitutional Convention of 1978* at 638 (hereinafter "Proceedings"). In 1979, the state legislature amended section 1-13 of the Hawai'i Revised Statutes that pertains to official languages to conform to the language of Article XV, sec. 4. See 1979 Haw. Sess. Laws, ch. 97, sec. 2; Conf. Rep. No. 38, 1979 Senate Journal at 1023; Conf. Rep. No. 962, 1979 House Journal at 1621.
- ⁸¹ Hawaiian Affairs Committee, Stand. Comm. Rep. No. 57, reprinted in *I Proceedings* at 638.
- ⁸² Committee of the Whole, Rep. No. 11, reprinted in *I Proceedings* at 1016.
- ⁸³ Debates in the Committee of the Whole on Hawaiian Affairs, Com. Prop. No. 12, reprinted in *II Proceedings* at 426, 432 (Sept. 2, 1978).
- ⁸⁴ *II Proceedings* at 428 (Sept. 2, 1978).
- ⁸⁵ *Tagufo v. Odo*, 843 F. Supp. at 631.
- ⁸⁶ Haw. Const., art. X, sec. 4.
- ⁸⁷ Hawaiian Affairs Committee, Stand. Comm. Rep. No. 57, reprinted in *I Proceedings* at 637.
- ⁸⁸ *I Proceedings* at 638.
- ⁸⁹ Committee of the Whole, Rep. No. 11, reprinted in *I Proceedings* at 1016.
- ⁹⁰ Education Committee, Stand. Comm. Rep. No. 39, reprinted in *I Proceedings* at 586, 590.
- ⁹¹ Convention Journal, Sept. 7, 1978, reprinted in *I Proceedings* at 274.
- ⁹² Second Reading, Committee of the Whole, Rep. No. 11, reprinted in *I Proceedings* at 274.
- ⁹³ Haw. Const., art. XII, sec. 7.
- ⁹⁴ Hawaiian Affairs Committee, Stand. Comm. Rep. No. 57, reprinted in *I Proceedings* at 640.
- ⁹⁵ *Kalipi v. Hawaiian Trust*, 66 Haw. 1 (1982).
- ⁹⁶ *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425 (1995).
- ⁹⁷ *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425 (1995) at 438.
- ⁹⁸ *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425 (1995) at 447-51.
- ⁹⁹ *Employees Retirement System v. Ho*, 44 Haw. 154, 159 (1960); see also, *Kono v. County of Hawaii*, 85 Hawai'i 61, 70 (1997) (constitutional provision stating that employment in civil service "as defined by law" will be based on merit does not create independent enforceable right under constitution).
- ¹⁰⁰ In other jurisdictions, parents and students have argued that a state's failure to provide equal funding for educational programs located in different counties is a denial of equal access to educational opportunities under a state's Education Clause constitutional provision. See *Leandro v. State*, 488 S.E.2d 249

(N.C. 1997) (North Carolina's Education Clause requires that "the people shall have a right to the privilege of education . . . [and] . . . equal opportunities . . . for all students"). Whether a right exists, however, depends upon the particular language contained in the state's enabling provision. Hawaii's Education Clause only requires that schools be "non-secular" and that they not discriminate because of race, religion, sex, or ancestry. Haw. Const. art. X, sec. 1, 4.

¹⁰¹ The law governing negotiable instruments such as bank drafts is found in Article 3 of the Uniform Commercial Code, codified at H.R.S. sec. 490:3-104, which only requires that the instrument be for a fixed amount of money payable at a date certain.

NOENOE K. SILVA

He Kānāwai E Ho'opau I Na Hula Kuolo Hawai'i: The Political Economy of Banning the Hula

IN 1859 A LAW WAS PASSED in the Hawaiian kingdom that virtually banned the performance of hula. This essay examines why, how, and by whom a legal ban was sought at that particular time. My method for this examination is to read not only the legal documents in the archive but also the newspaper articles and letters concerning hula leading up to the ban, and during the time the ban was in effect, in both the Hawaiian- and English-language newspapers in Honolulu.¹

In 1820 puritanical missionaries arrived, who, we suppose, were shocked by the Kanaka Maoli's (Native Hawaiians') unabashed expressions of sexuality. Hula performance can be viewed as suffused with sexual expression, especially *hula ma'i* (genital-celebrating hula). It is reasonable to suppose that the missionaries sought to silence this rather obvious public demonstration of sexuality on the grounds that it was vulgar, savage, and a violation of their Christian morals. It was no doubt part of the civilizing process.²

After a few years, the missionaries succeeded in converting some powerful *ali'i*, such as Ka'ahumanu. The first ban on hula occurred in about 1830, when Ka'ahumanu was traveling about O'ahu with the missionary Levi Chamberlain and others.

The purpose of this famous circuit was to encourage the people to learn to read and write, to instruct the land agents to take care of the

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